

FEBRUARY 2015

ACT 168 OF 2014 “PASS THE TRASH”

Among other changes aimed at protecting Pennsylvania’s children, former Governor Tom Corbett signed Act 168 of 2014 on October 22, 2014, with an effective date of December 21, 2014. Also known as the “Pass the Trash” legislation, the changes made in the act greatly increased the steps involved in hiring anyone who might be deemed to have “direct contact with children.”

Initially, those impacted by this act are (1) school entities, (2) all those contractors for schools whose personnel have “direct contact with children” (defined here as the “possibility of care, supervision, guidance or control of children or routine interaction with children”) and (3) all those current and prior employers of people applying to work for (1) or (2) above. The legislation does not impact current school employees and those independent contractors already working both at a school and having direct contact with children.

Before individuals may be hired (or, in the case of an independent contractor, assigned) to a position involving “direct contact with children,” such personnel must complete forms including the following information:

- Listing current and prior employers that were schools or otherwise involved direct access to children.
- Give consent and authorization for the above employers to give information, and a waiver of any claim for complying.
- Indicate if he or she has ever been investigated, disciplined up to and including termination or permitted to resign or had a license/certificate impacted due to any allegations of abuse or while such allegations were pending. (The list is more exhaustive than above).

The Pennsylvania Department of Education (PDE) form for this can be downloaded from the [PDE website](#).¹

The school or contractor must then:

- Contact each prior employer by sending out that form and confirm the information the applicant/employee gave.
- Check license or certificate status or any other requirements both for eligibility and to see if ever professionally disciplined.

- Determine if PDE has received notice of any pending criminal charges against the individual.

Once such a current or past employer receives such a form concerning a current or past employee, that entity must return the completed form within 20 days. The school/contractor will review the returned forms. Where there are any affirmative responses relating to abuse, the school/contractor may choose to not hire the individual and the inquiry ends. But where the school/contractor still wishes to consider the individual for the position, the school/contractor may send out a follow-up request for further information and related records. The form for that is also available from the [PDE website](#).² Once the school/contractor sends the follow-up form, the current or past employer is required to again comply with those subsequent requests within 60 days of receipt.

The information learned will obviously be factored into employment decisions, but may also be sent to other appropriate agencies such as the police, PDE, child protective services or the like, who may take independent action.

Failure by a current or past employer to provide the required information will only be excused where another state's law prevents it or an agreement entered prior to December 21, 2014, (Act 168's effective date) requires the information not be released. Also, while such information might normally be confidential under the Educator Discipline Act, the new enactment expressly waives that confidentiality in this context.

If a contractor is considering placing an individual in a position at a school that involves direct contact with children, and there is some

indication of prior possible allegations of abuse from the above forms, the contractor must notify the school and give the school an opportunity to reject that individual. The school may also ask for further information to clarify the nature of the reported incident. Once that information is reviewed, the school may still reject the individual.

Failure of a current or prior employer to accurately complete and return the form will be considered a violation and, if intentional, is monetarily and otherwise sanctionable.

As with other similar statutes, an employer is permitted to hire an individual on a provisional basis on certain pre-conditions and restrictions before it receives back the information from other current and past employers. However, **if those forms are not returned, or are returned but incomplete, the school/contractor should consider that fact but then (according to PDE) may still hire the individual.**

Although, as above, a pre-existing contractual term (whether in a CBA or separation agreement) might contain language keeping an employer from divulging abuse allegations, Act 168 makes such provisions void in any agreement dated after December 21, 2014. But Act 168 goes even further, and indicates that neither schools nor independent contractors may take any action going forward that would expunge such information from the employer's records unless investigated and found to be false. Note that allegations with insufficient proof are not the same as ones proved to be false.³

Substitutes also need to have these background checks performed, but only when first hired or placed on a school's sub list. So long as the substitute remains on the list or is

otherwise employed by that school entity, the check need not be repeated. This is also true where a school obtains substitutes from a service or IU. The service's or IU's background check are sufficient so long as employed by such an IU or service or on their lists.

Violations, whether by the applicant, the school administrator, independent contractor or a prior employer⁴ will be determined by PDE after a hearing. For willful violations by any above party, PDE can impose a fine of up to **\$10,000**, bar the contractor or prior employer from contracting with any Pennsylvania school and may also take action under the Educator Discipline Act. An applicant who provides false information or willfully fails to disclose information may also be terminated and criminally charged.

PDE has also **published a FAQ**, but leaves various implementation questions for schools to determine with their solicitors.⁵

If you have any questions about the above, you may contact A. Kyle Berman at 610.397.7980 or aberman@foxrothschild.com or any member of the firm's Education Law Practice.

¹http://www.portal.state.pa.us/portal/server.pt/document/1464556/form-dptt_pdf

²http://www.portal.state.pa.us/portal/server.pt/document/1464555/form_-_dptt_-_employer_follow_up_pdf

³The PDE forms do not inform current/past employers of the statutory exceptions to disclosure: confidentiality imposed by statute in another jurisdiction or by contract pre-dating 12/22/2014.

⁴But only where PDE has jurisdiction to do so.

⁵http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.pt/gateway/PTARGS_0_148494_1471561_0_0_18/Act%20168%20-%20FAQs.pdf



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